General Processing Corporation *and* United Steelworkers of America, AFL-CIO. Case 10-CA-16028

July 30, 1982

DECISION AND ORDER REMANDING PROCEEDING TO THE ADMINISTRATIVE LAW JUDGE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On September 29, 1981, Administrative Law Judge James L. Rose issued the Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Administrative Law Judge's Decision in light of the exceptions and briefs and has decided to affirm his rulings,[1] and findings, and conclusions only to the extent consistent herewith.

The complaint alleges in part that Respondent General Processing Corporation is the successor employer of Philips Industries, Inc., and that by its refusal to recognize and bargain with the Union it violated Section 8(a)(5) of the Act. The Administrative Law Judge correctly states that where, as here, the alleged successor produces the same products with the same equipment, with the same skill level of employees, for the same customers as the previous employer, the successorship issue turns on whether a majority of the alleged successor's bargaining unit employees had been bargaining unit employees of the previous employer. *United Maintenance & Manufacturing Co., Inc.*, 214 NLRB 529, 533 (1974). To that end, the Administrative Law Judge undertakes a detailed discussion of who worked for Respondent General Processing Corporation in its first months of operations and which of those General Processing Corporation employees had been employees of the previous employer, Philips Industries, Inc. The record contains two exhibits which, along with certain explanatory testimony, constitute the basis for determining whether in fact a majority of Respondent's employees were former unit employees of Philips Industries. The first of these exhibits is a joint exhibit which lists the names and first date of work of all the employees hired by Respondent from its first day of operations (June 9, 1980) to the date of the issuance of the complaint (August 26, 1980). The second of these exhibits is a copy of the seniority list of the employees of Philips Industries, Inc., as of March 1980.[2]

The Administrative Law Judge compared these two exhibits and compiled a table, set out in his Decision, of 41 employees who were hired by Respondent and who had previously been working for Philips Industries. We find that, in making this determinative computation, the Administrative Law Judge made two errors. First, he included two persons—Clifford Campbell and Dallas Hamby—whose names do not appear on the seniority list. This was an error. Thus, on this record, there is no persuasive evidence that either Clifford Campbell or Dallas Hamby, both of whom it is conceded started work for Respondent on June 16, 1980, were in fact working for Philips Industries. Second, the Administrative Law Judge included three persons—Jeff Burnett, Tom Dunaway, and Bob Mitchell—whose names do not appear on the original typed portion of the seniority list. Those three names are merely penciled onto the seniority list. When the General Counsel offered the seniority list into evidence, Respondent's counsel objected to any weight being given to the three names which were not typed on the list. The Administrative Law Judge received the exhibit, specifically—and correctly—limited to the typed names on the document.[3] Yet in compiling his table of Respond-

[1] We find no merit in Respondent's exception to the Administrative Law Judge's ruling to allow the testimony of Earl Dodson, George Davis, Herbert Davis, Kenneth Blaylock, and Charles Pickett even though he had granted Respondent's motion at the outset of the hearing to invoke the sequestration rule. Under the circumstances present here, we find that the Administrative Law Judge complied with our current policy regarding the exclusion of potential witnesses. See *Unga Painting Corporation*, 237 NLRB 1306 (1978). Moreover, Respondent has not shown that the ruling prejudiced its case. *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Local Lodge No. 732, AFL-CIO (Triple A Machine Shop, Inc., d/b/a Triple A South)*, 239 NLRB 504, fn. 1 (1978).

[2] The most recent collective-bargaining agreement, effective November 6, 1977, through August 15, 1980, and signed by Philips Industries, Inc., and the Union, provided that the Company shall post every 6 months an up-to-date list of all employees according to their hiring dates. This exhibit is a copy of the March 1980 seniority list.

[3] The seniority list was introduced through the testimony of Horris Norrod, president of the Union Local. During *voir dire* examination by Respondent's counsel, Norrod stated that his copy of the typed list, which he received pursuant to the collective-bargaining agreement, did not have the penciled-in lines and notations which appear on the copy identified and offered at the hearing by the General Counsel. Norrod testified specifically that the three names—Burnett, Dunaway, and Mitchell—which are penciled-in on the copy of the seniority list which was ultimately received into the record did not appear on the original of the document which he had been provided. Respondent's counsel at the hearing then stated he had no objection to the document "which purports to be a seniority list" but that he objected "to it for whatever matter is asserted as a result of the markings on the document." The Administrative Law Judge agreed to this limitation on the document, stating "Okay. I won't consider any of the—but will receive it."

ent's employees who had worked for Philips Industries, the Administrative Law Judge disregarded his limitation on the receipt of the exhibit and included the three penciled-in names in his table. This was an error. Thus, on this record, there is no persuasive evidence that Jeff Burnett, Tom Dunaway, or Bob Mitchell was working in the bargaining unit for Philips Industries.

To correct the Administrative Law Judge's figures in light of these two errors, the names of Burnett, Campbell, Dunaway, Hamby, and Mitchell must be removed from his table of Respondent's employees who had previously worked for Philips Industries. In his Decision, the Administrative Law Judge compiled a second table, which showed for various dates in June, July, and August 1980 both the total number of employees working in the bargaining unit for Respondent and the portion of that total number who had previously been working as employees of Philips Industries. Due to the two errors in his first table, the Administrative Law Judge's second table is inaccurate. As corrected, beginning with the date of Respondent's receipt of the Union's bargaining demand, the second table should read as follows (ratio of former Philips employees to all Respondent employees): June 13, 5 of 11; June 16, 14 of 42; June 17, 15 of 43; June 19, 21 of 49; June 20, 24 of 53; June 23, 31 of 68; June 24, 31 of 69; June 26, 32 of 71; July 7, 32 of 72; July 8, 33 of 73; July 21, 35 of 79; August 4, 35 of 81; August 18, 36 of 84; and August 21, 36 of 85. A correct computation reveals that, from the date of Respondent's receipt of the Union's demand through the date of the complaint's issuance, there was never a time when a majority of Respondent's bargaining unit employees were employees who had been working for Philips Industries in the bargaining unit. Under these circumstances, and absent a showing that this lack of majority status was caused by Respondent's illegal failure to hire former Philips employees in violation of Section 8(a)(3), Respondent is not a successor employer, had no obligation to recognize or bargain with the Union, and did not violate Section 8(a)(5) of the Act by failing to do so.[4]

The complaint also alleges that Respondent violated Section 8(a)(3) of the Act by refusing to hire former Philips employees because of their union membership and activities. In addition, the complaint alleges that "but for" that illegal refusal to hire Respondent would have employed, as a majority of its employees, individuals who were previously employees of Philips. Although the Administrative Law Judge discussed the 8(a)(3) issue and concluded there was no 8(a)(3) violation, we find that his analysis and conclusion on the 8(a)(3) issue in his present Decision is precariously dependent on his erroneous finding that in fact a majority of Respondent's employees had been Philips employees. A close reading of the record convinces us that the foundation of the Administrative Law Judge's finding of no 8(a)(3) violaton is, in the present form of his Decision, his erroneous finding of the existence of an 8(a)(5) violation. In light of our reversal of his 8(a)(5) analysis and conclusion, we are not left with an adequate determination of the refusal-to-hire allegation.[5] In these circumstances, we find it appropriate to remand the proceeding to the Administrative Law Judge for an evaluation of the 8(a)(3) portion of the allegation and issuance of a supplemental decision, untainted by the erroneous 8(a)(5) finding.[6]

ORDER

It is hereby ordered that this case be, and it hereby is, remanded to the Administrative Law Judge for the preparation of a supplemental decision containing findings of fact, conclusions of law, and recommendations, in accordance with this Decision and Order Remanding and that, following service of such supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, shall be applicable.

[4] Member Fanning concurs in the result here, but he does not believe that in every case there must be an absolute majority of the predecessor's employees before a duty to bargain can be found. See *United Maintenance & Manufacturing Co., Inc.*, 214 NLRB at 536, fn. 21, and cases cited therein.

[5] We note that there is extensive testimony in the record by Respondent's president as to whom he hired and why, as well as to his business approach *vis-a-vis* unionization. The Administrative Law Judge did not discuss substantial portions of this testimony. On reconsideration, the Administrative Law Judge is not precluded from making a finding of union animus if he finds the record so warrants.

[6] On remand, the Administrative Law Judge is to determine whether Respondent violated Sec. 8(a)(3) of the Act in its hiring practices. Our conclusion here that at no relevant time were a majority of Respondent's employees former Philips employees does not preclude the Administrative Law Judge from finding, if the evidence so warrants, that Respondent violated Sec. 8(a)(3) of the Act by its refusal to hire certain Philips employees, that but for the refusal a majority of Respondent's employees would have been former Philips employees, and that therefore Respondent has on that theory violated Sec. 8(a)(5) of the Act. See *Potter's Drug Enterprises, Inc., d/b/a Potter's Chalet Drug and Potter's Westpark Drug*, 233 NLRB 15, 20 (1977); *Karl Kallman d/b/a Lowe's Barbeque Restaurant No. 62; Lowe's Enterprises, Inc.*, 245 NLRB 78, 81-82 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981).